

SL(5)579 – The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulation 2020

Background and Purpose

The Health Protection (Coronavirus Restrictions) (No. 2) (Wales) Regulations 2020 (“the Regulations”) are made under sections 45C(1) and (3)(c), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984 in response to the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 which causes the disease known as COVID-19 or “coronavirus”.

The Regulations revoke the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 and all the regulations which have amended them (together the “Original Regulations”).

The Regulations:

- restate certain provisions of the Original Regulations, such as the requirement to keep certain businesses, premises, facilities, footpaths and land closed, albeit the list of place which must remain closed is not as extensive as required by the Original Regulations. Places which are now permitted to open include businesses which sell food for consumption on the business’ outdoor premises, hair salons and barbers, self-contained accommodation; places of worship and outdoor cinemas;
- require certain steps to be taken by those businesses which are permitted to open, in order to minimise the risk of transmission of the coronavirus. These steps include the continuation of the requirements to take all reasonable measures to ensure that a distance of 2 metres is maintained between persons on the premises, and where persons are required to wait to enter the premises, that a distance of 2 metres is maintained. Additionally, the Regulations now also require a range of other reasonable measures intended to minimise exposure to the virus, for example measures which limit close face to face interaction and maintain hygiene. The Welsh Ministers may issue guidance on taking measures to minimise the risk of exposure to coronavirus to which persons responsible for taking reasonable measures under the Regulations must have regard.; and
- restrict gatherings, but with changes to some of the restrictions which were set out in the Original Regulations. These Regulations now also provide that individuals, including members of a household (extended or otherwise), may also gather with other individuals if they are participating in an organised outdoor activity, providing that no more than 30 individuals in total are involved in that activity. The Explanatory Memorandum states that the intended effect of this provision is that people may join together outside to take part in an activity, for example sport or perhaps a tour of an outdoor attraction, where there is an organiser of the event who has undertaken appropriate risk assessments and during the activity takes all reasonable measures to minimise the risk of exposure to coronavirus for the participants.

The Regulations are subject to review on or before 30 July 2020 and thereafter at least every 21 days. The Regulations expire on 8 January 2021.



Procedure

Made affirmative.

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd must approve the Regulations within 28 days (excluding any days when the Senedd is dissolved or in recess for more than four days) of the date they were made for them to continue to have effect.

Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 in respect of this instrument.

1. Standing Order 21.2(iv): that it appears to have retrospective effect where the authorising enactment does not give express authority for this

The Regulations are expressed to come into force in accordance with regulations 1(3) and 1(4).

Regulation 1(3) sets out a list of individual Regulations which Regulation 1(3) purports to have brought into force on 11 July 2020. The list includes:

- Regulation 2, which sets out the meaning of certain words and phrases used in the Regulations;
- Regulation 3, which revokes the Original Regulations, but only insofar as revoking the provisions relating to the closure of certain businesses, premises and holiday accommodation and contravention of those provisions;
- Regulation 8, which requires the closure of holiday accommodation except for self contained accommodation, caravan pitches and certain other businesses;
- Regulation 9, which deals with businesses which form part of other businesses, but only insofar as it applies to Regulation 8;
- Regulations 12 (reasonable measures to minimise the risk of exposure to coronavirus) and 13 (guidance on minimising exposure), insofar as they apply to people responsible for holiday accommodation; and
- Regulations 17 to 22, which deal with the enforcement of restrictions and requirements, but only insofar as they apply to Regulation 8.

Regulation 1(4) states that for all other purposes the remainder of the Regulations which are not listed in Regulation 1(3) came into force on 13 July 2020.

The list of Regulations which Regulation 1(3) seeks to bring into force on 11 July 2020 does not include Regulation 1 itself. Therefore, pursuant to Regulation 1(4), the whole of Regulation 1 came into force on 13 July 2020.

The effect of this is that when Regulation 1 came into force on 13 July 2020, it retrospectively brought into force all of the Regulations listed in Regulation 1(3) with effect from 11 July 2020. Sections 45C(1) and (3)(c), 45F(2) and 45P of the Public Health (Control of Disease) Act 1984 do not give express authority for the Regulations to have retrospective effect.

In addition, under Regulations 17 to 22, which also came into force retrospectively insofar as they apply to Regulation 8, any failure to comply with Regulation 8 is a criminal offence punishable by a fine. Article 7 of the European Convention of Human Rights states that "No one shall be held guilty of any criminal



offence on account of any act or omission which did not constitute a criminal offence under national law at the time when it was committed". In essence, this means that criminal law must not come into force retrospectively.

A Welsh Government explanation is required to deal with the matters raised in this reporting point.

2. Standing Order 21.2(vi): that its drafting appears to be defective or it fails to fulfil statutory requirements

The Regulations are expressed to come into force in accordance with regulations 1(3) and 1(4). Regulation 1(3) sets out a list of individual Regulations which Regulation 1(3) purports to have brought into force on 11 July 2020. This list does not include Regulation 1 itself. Regulation 1(4) states that for all other purposes the remainder of the Regulations, which includes Regulation 1 itself, came into force on 13 July 2020. This means that Regulation 1(3), which purports to have brought some of the Regulations into force on 11 July 2020, did not itself come into force until after this date on 13 July 2020. A response is required from the Welsh Government to fully explain this drafting irregularity.

3. Standing Order 21.2(vii) – that there appear to be inconsistencies between the meaning of its English and Welsh texts

- a) There are some typographical errors in the explanatory note to the Regulations. The fifth paragraph uses 'pebaent' instead of 'pe baent', and the sixth paragraph (penultimate word) has spelt 'fynd' incorrectly. However whilst saying this, in relation to the last few words of the sixth paragraph, we consider the meaning of "and land accessible by the public" is better reflected in the Welsh text as "a thir sy'n hygyrch i'r cyhoedd" (as was used in SI 2020/353 (W. 80)) rather than "a thir y gall y cyhoedd fynd iddynt".
- b) In the italicised text before the Preamble in the Welsh text, the date the Regulations were laid before Senedd Cymru is incomplete.
- c) There are also typographical errors in the body of the Regulations – regulation 8(4)(a)(iii) should say 'wedi' instead of 'wed'; there seems to be a rogue 'y' in "neu y 8(1)" in regulation 9; and regulation 12(3)(d) should say 'iddi' instead of 'iddit'.
- d) A number of cross references in the Welsh text are not included but instead say "Error! Reference source not found." This happens in regulations 9, 12(3)(g), 12(3)(h) and 20(1)(a).
- e) In regulation 11(2)(a) we do not consider the meaning of "to be liable to large numbers of people congregating" is accurately reflected in the Welsh text. The Welsh text says "eu bod yn debygol o ddenu niferoedd mawr o bobl yn ymgynnull" which translates as "likely to attract large numbers of people congregating". We consider the meaning is better reflected as "sydd â thuedd i niferoedd mawr o bobl yn ymgynnull arnynt" (which was the approach taken in SI 2020/334 (W. 76)).
- f) The English text of regulation 12(2)(a)(ii) refers to persons waiting to enter premises and says "a distance of 2 metres is maintained **between them**" (emphasis added) whilst the Welsh text translates as "a distance of 2 metres is maintained".
- g) The Welsh text in regulation 20(6) refers to paragraph 20(1) whilst the English text refers to paragraph (1).



- h) Regulation 20(11) talks about Partnership **assets**, whilst regulation 20(12) talks about an unincorporated association's **funds** (emphasis added). The Welsh text uses 'gronfeydd' for both 'assets' and 'funds', but we consider 'asedau' better reflects the English word 'assets'.
- i) The meaning of 'fixed penalty notice' in the Welsh text at regulation 21(2) appears to be written in the wrong order. It translates as "A notice is a fixed penalty notice offering the person to whom it is issued..." whilst the English text, which seems to make more sense, is "A fixed penalty notice is a notice offering the person to whom it is issued..."

Merits Scrutiny

The following six points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii): that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Human Rights

The Explanatory Memorandum makes reference to the impact that the Regulations have on human rights. It is stated that the Regulations engage individual rights under the Human Rights Act 1998 and the European Charter of Fundamental Rights. The Explanatory Memorandum goes on to list the rights which are engaged as Article 5 (right to liberty), Article 8 (right to respect for private and family life), Article 9 (freedom of thought, conscience and religion), Article 11 (freedom of assembly and association) and Article 1 of the First Protocol (protection of property). All of these are references to Articles in the European Convention of Human Rights ("ECHR") and no further reference is made to the European Charter of Fundamental Rights. The Explanatory Memorandum does not elaborate on how each of the rights under the ECHR that it mentions are engaged, but states that:

"Each of these are qualified rights, which permit the Welsh Ministers to interfere with the exercise of the rights if necessary in a democratic society in the interests of public safety or for the protection of health. All such restrictions and requirements must be justified on the basis that they are in pursuit of a legitimate aim, namely of protecting public health and are proportionate. The continued easing of the restrictions made under the original Regulations by these Regulations, is a proportionate response. It balances the need to maintain an appropriate response to the threat posed by the coronavirus against the rights of individuals and businesses, in a manner which remains proportionate to the need to avoid an increase to the rate of transmission of the coronavirus, taking into account the scientific evidence."

The explanation as to how these rights are qualified and how interference is justified in respect of Articles 5, 8, 9 and 11 is welcomed. However, in order to provide a fuller understanding of the position regarding human rights, the Welsh Government is asked to provide:

- a) a more specific analysis as to how Articles 5, 8, 9 and 11 and Article 1 of the First Protocol to the ECHR are engaged by the Regulations;
- b) details of any justification for interference with the protection of property under Article 1 of the First Protocol to the ECHR, as justification for interference in respect of this right differs from the others cited in the Explanatory Memorandum – such interference is only permitted if it is in the public interest and in accordance with the general principles of international law; and



- c) further information as to what rights under the European Charter of Fundamental Rights it considers are engaged and in what way, and how interference with such rights is justified.

In addition, we refer further to the issue of retrospectively effective criminal law, as referenced in technical reporting point 1. Under Regulations 17 to 22, which came into force retrospectively insofar as they apply to Regulation 8, any failure to comply with Regulation 8 is a criminal offence punishable by a fine. Article 7 of the European Convention of Human Rights states that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law at the time when it was committed”. In essence, this means that criminal law must not come into force retrospectively.

Confirmation is required from the Welsh Government as to whether it considers that Article 7 of the ECHR is engaged by the drafting issues raised regarding Regulation 1 and, if so, how it proposes to rectify this.

2. Standing Order 21.3(ii): that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Cross-border issues

The Explanatory Memorandum makes specific reference to preservation of the concept of ‘extended households’ in the Regulations, where two households are permitted to form a single household and be able to meet indoors and have physical contact.

The Explanatory Memorandum states that “The two households may not necessarily both reside in Wales but in that situation they will be treated as single household as far as these Regulations are concerned and if one of the households sought to form an extended household with a third household outside of Wales that would not be permitted under these Regulations, even if it were to be permitted under the law applicable in the other territory where the third household resided.” (our emphasis)

As the Public Health (Control of Disease) Act 1984 states that the Wales restrictions apply “as respects Wales”, can the Welsh Government provide a practical explanation as to how this works in the context of the underlined wording in the preceding paragraph?

3. Standing Order 21.3(ii): that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Regulation 8 permits self-contained accommodation to open, as long as (amongst other requirements) it is only let to members of the same household. Regulation 2(4) confirms that for the purposes of the Regulations, references to “households” would include extended households, the creation of which is permitted. Failure to comply with Regulation 8 is an offence which is punishable by the imposition of a fine. However, it is not clear from the Regulations what the owner of any self-contained accommodation must do in order to satisfy themselves that they are actually letting the property to members of the same household, whether extended or not. For example, will it be enough to simply ask a person at the time of booking whether they are booking it for members of the same household, or will the owner need to request some form of evidence in order to protect themselves against a fine, should it transpire that the person(s) letting the property are not doing so for members of the same household? Clarification is requested from the Welsh Government as to how it envisages that the requirement to let to members of



the same household, whether extended or not, is to be applied in practice by the owner of self-contained accommodation so that they can protect themselves against a potential fine.

4. Standing Order 21.3(ii): that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Inconsistency between the Regulations and the Explanatory Memorandum

Regulation 5(1) states that these Regulations expire at the end of the day on 8 January 2021. It is stated on page 5 of the Explanatory Memorandum that the Regulations expire on 9 January 2021. Although this may be a typographical error, given the gravity and far-reaching extent of these Regulations, the expiry date is likely to be an important point for many people in Wales and care must be taken to ensure that it is accurately reflected, especially in explanatory documents which are intended to assist understanding of the Regulations.

5. Standing Order 21.3(ii): that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

These points were highlighted in a note prepared for Members of the Senedd dated 15 April 2020 in relation to the Health Protection (Coronavirus Restrictions)(Wales) Regulations 2020. The Welsh Government responded to other matters raised in that note on 28 April 2020 but was not specifically required to respond to these points and so did not, nor have these points been addressed in these Regulations. They are therefore repeated here in the context of these Regulations.

Power of entry

A person exercising a power of entry under regulation 19 of these Regulations is required to provide evidence of their identity and outline the purpose for which they power is exercised. Although this may imply that the person must provide evidence of their authority to exercise the power of entry (particularly when they are a person designated by the Welsh Ministers, a local authority, a National Park authority in Wales or Natural Resources Wales), it is not clear that the evidence of identity expressly includes evidence of authority to exercise the power. A requirement to provide evidence of authority is common when exercising powers of this nature.

Further, although providing an outline of the purpose for which the power is exercised may also require a person to provide the reasonable grounds for suspecting that a requirement imposed by these Regulations is being, has been or is about to be contravened on the premises, it would be reasonable to expressly set out a requirement to provide that information.

Although the omission of express wording does not materially adversely affect these Regulations, inclusion of appropriate express wording would provide additional protections, and greater clarity, for those that are subjected to the power of entry.

Fixed Penalty Notice

The following points are noted by the Committee in relation to fixed penalty notices under these Regulations:

- a notice must specify the local authority, or person designated by the Welsh Ministers to receive payment, to whom a fixed penalty must be paid, but in relation to a contravention of regulation 11(4) of these Regulations in a National Park, it is not clear whether payment of a fixed penalty



would be made to the National Park authority or the county or county borough council in which that National Park is located;

- regulation 21(9) of these Regulations provides each authority with discretion to offer a discount for early payment under a fixed penalty notice – this could create inequality between areas in Wales in some authorities adopt the discount but others do not;
- it is unclear if it will be possible to identify whether a person has already received a fixed penalty notice under these Regulations for the purposes of imposing a higher fixed penalty under regulation 21(10) of these Regulations – as it is possible for at least 30 organisations to be administering fixed penalty notices, there is potential for inequality of treatment of offenders across Wales; and
- the only method of payment of a fixed penalty notice expressly required under the Regulations is by way of payment by post addressed to the local authority in question, even though many local authorities in Wales may have limited staff working at their offices – although authorities can, and most likely will, offer payment by telephone or online, those would be helpful options to be expressly referenced in these Regulations.

6. Standing Order 21.3(ii): that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

Equality

The Committee notes that its previous comments regarding the failure to address equality in any of the Explanatory Memoranda to the Original Regulations have been taken into account. The inclusion in the Explanatory Memorandum for these Regulations of a summary of the equalities impact assessment undertaken in respect of the Regulations is welcomed.

Implications arising from exiting the European Union

None

Government Response

A Welsh Government response is required to all points save for the final merits reporting point (number 6).

Committee Consideration

The Committee considered the instrument at its meeting on 3 August 2020 and reports to the Senedd in line with the reporting points above.

